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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. ——,

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

E. I. DU PONT DE NEMOURS & COMPANY

No. ——,

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

ASSOCIATION OF CHEMICAL EMPLOYEES AT BELLE WORKS OF E. I. DU PONT DE NEMOURS & COMPANY

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, prays that writs of certiorari issue to review the decision of the United States Circuit Court of Appeals for the Fourth Circuit entered on December 27, 1940, setting aside and refusing to enforce an order issued by the

Board against E. I. du Pont de Nemours & Company (R. V, 1676–1677).[1]

OPINIONS BELOW

The opinion of the Circuit Court of Appeals (R. V, 1657–1675) is reported at 116 F. (2d) 388. The findings of fact, conclusions of law, and order of the Board (R. I, 125–193) are not yet reported in permanent form, but are presently available in advance sheet form (24 N. L. R. B. No. 98).

JURISDICTION

The decree of the Circuit Court of Appeals was entered on December 27, 1940 (R. V, 1676–1677). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and

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[1] The decrees were entered in two distinct proceedings for review of the Board's order, instituted, respectively, by E. I. du Pont de Nemours & Company and by the Association of Chemical Employees of E. I. du Pont de Nemours & Company (herein referred to as the A. C. E.), a labor organization found by the Board to be company-dominated. In its answer to the Company's petition the Board requested enforcement of its order.

Pursuant to a stipulation of the parties (R. V, 1678–1679) the printed record for purposes of the petition for writs of certiorari consists of five volumes. The first four volumes contain the portions of the record printed by the Company as an appendix to its brief in the Circuit Court of Appeals. The fifth volume contains the portions of the record printed by the Board and the Association as appendices to their briefs below, the portions printed by the Company and the Association as appendices to their reply briefs below, and the proceedings in the Circuit Court of Appeals. The reference "Tr." is to the typewritten transcript of the testimony on file with the clerk of this Court.

under Section 10 (e) and (f) of the National Labor Relations Act.

QUESTIONS PRESENTED

1. From 1933 to 1937 the Company dominated, interfered with and supported two successive "Plans" of employee representation. When the legality of the second Plan was challenged, officers of the Plan, acting pursuant to a formal resolution of the Plan's governing body, met on company time and property to "revise" it so as to make it legal under the Act. When this process was virtually completed the Company, pursuant to an agreement with a representative of the National Labor Relations Board, posted a notice to the employees announcing that the Plan might be illegal and that the management would no longer bargain with it but would continue to discuss grievances with any group of employees. The leaders of the Plan then completed their reorganization project, to some extent continuing to use company time and property. The resulting labor organization, under virtually the same leadership as the Plan, launched an organizational drive in which supervisory employees campaigned for the "inside" union and against the "outside" organization. The question presented is whether the Board could validly find that the Company violated Section 8 (2) and (1) of the Act with respect to the successor organization thus established or whether, as the court below held, the

Board was bound to find that the notice posted by the Company restored conditions permitting a completely free choice by the employees and that the successor organization was formed as an exercise of that choice.

2. Whether the Board could properly issue cease-and-desist and disestablishment orders upon its admittedly valid findings that the Company dominated, interfered with, and supported the two "Plans," despite the fact that the Plans had disappeared by the time of the hearing.

3. Whether anti-union threats and other activities by supervisory employees afford sufficient basis for an order by the Board requiring the Company to cease and desist from interfering with the rights of its employees.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act are set forth in the Appendix.

STATEMENT

Upon the usual proceedings the Board issued its findings of fact, conclusions of law, and order (R. I, 125–194). Omitting jurisdictional findings, the facts, as found by the Board and as shown by the evidence, may be summarized as follows:[2]

In June 1933, the Company established at its Belle, West Virginia, chemical plant an admittedly company-dominated plan of employee repre-

[2] In the following statement, the references preceding the semicolons are to the Board's findings and the succeeding references are to the supporting evidence.

sentation known as the Works Council Plan (R. I, 131; 38–48 IV, 1369). The Works Council Plan possessed the familiar attributes of employer-created organizations of that period: rigid management control through "joint" committees, automatic employee membership, financial support, payment of councilmen for time spent on Plan business, and management veto of action taken by the governing bodies (R. I, 132; 38–48, 385–386). It is not disputed that the Company's continued maintenance of the Works Council Plan for almost two years after the Act became effective constituted an unfair labor practice.

In March 1937, contemporaneously with the commencement by the United Mine Workers (herein called the U. M. W.) of an organizing campaign in all chemical plants in the Kanawha River valley, where the Belle plant is located, the Works Council Plan was revised by management and employee representatives on the Council in order to strengthen its position as a competitor of the U. M. W., and in view of the National Labor Relations Act (R. I, 133–135; III, 905–909, 975, IV, 1206–1207, V, 18–19). Management representatives were eliminated from the governing body, and the name of the organization was changed to "Employees' Council Plan" (R. I, 133–134; 49–56). Otherwise the scheme of the Works Council Plan was retained unchanged; the Company continued to furnish all the necessary facilities and to pay all expenses of operation, including the

wages of councilmen for time spent on Plan business (R. I, 133–134; 141–142, 392–393). Eight of the nine employee representatives under the Works Council continued to serve as councilmen under the Employees' Council (R. I, 141; IV, 1238–1239, 1270–1272). It is not disputed that the Company dominated and interfered with the Employees' Council in violation of Section 8 (2) and (1) of the Act.

In July 1937, the U. M. W. filed charges with the Board challenging the legality of the Employees' Council Plan (R. I, 146; IV, 1374). Upon being informed by a representative of the Board that the charges probably had merit, Toney, president of the Plan, consulted Doherty, assistant general manager of the plant (R. 147; II, 481–482, III, 1054–1055). Doherty told Toney, and two other councilmen who subsequently consulted him, that he could not advise them and that if they needed an attorney they would have to get one (R. 147; I, 229, II, 477). Doherty testified that he gathered that the councilmen "were trying to find a way to make when [what] they had legal" (R. I, 147; II, 561). On August 16, 1937, the Council, meeting on company time and property, appointed a committee "to revise" the Plan and "to gather any other information necessary to bring the plan into conformity with" the Act (R. I, 147; IV, 1422–1425). Following Doherty's advice (R. I, 148; I, 229, II, 477), this committee left the plant the next day, on Company time for which they were paid, to consult

M. E. Boiarsky, an attorney (R. I, 148; III, 918, 920). Boiarsky told the committee that he could not consult with them as a committee of an organization which had been company sponsored, but that he would be willing to consult with them on their own time as individuals desiring to form a new organization (R. I, 148; III, 919, Tr. 3597–3598). The committee reported back to the Council the next day, and that entire day, August 18, was spent by the Council, without loss of pay, in discussing on company property the reorganization project (R. I, 148; IV, 1415–1418). Upon the recommendation of Boiarsky, the Council passed a resolution that subsequent meetings of the revision committee should not be held on company time or property (R. I, 149; III, 920, IV, 1415). That same night several of the councilmen met again in Boiarsky's office; at his insistence they agreed to consider themselves as individuals rather than as councilmen, though this fictional metamorphosis considerably baffled them (R. I, 149; III, 922–923, 990). By August 26 the revised Plan was almost ready (R. I, 150; III, 927).

On the morning of August 31, Cheetham, general manager of the plant, summoned the councilmen to his office and announced that he had agreed with the Board's regional director at Cincinnati to cease recognizing the Employees Council Plan and that the councilmen could have the rest of the day, with pay, to settle the organization's affairs

(R. I, 150; II, 409–412, 483, III, 931–932). One of the councilmen then stated that they were drawing up a new plan (R. I, 151; 233, V, 5, cf. V, 13). The same day, the company posted the following notice in the plant (R. I, 151–152; IV, 1363):

NOTICE TO EMPLOYEES

> The Director of the Regional Labor Relations Board at Cincinnati, after investigation, has informally advised the Management that the Belle Plant Works Council does not meet the requirements of the National Labor Relations Act (Wagner Act) as a collective bargaining agency of the employees of the Belle Works. For example, the Council, as it is now constituted, has been meeting on Company property and on Company time, which may be construed as Company assistance and hence contrary to the Act.
>
> In order that it may comply with the suggestion of the Regional Director, the Management is therefore unable to permit further meetings of the Belle Plant Works Council on Company property and on Company time, or to bargain collectively with it in the future.
>
> However, in accordance with its long established policy and as required by the Act, the Management will continue to receive and adjust grievances presented by any individual employee or any group of employees, and no employee will suffer any

loss of time or pay while conferring with the Management in such cases.

C. H. DOHERTY, Jr., *Manager.*

The notice also appeared in the September 1 issue of *Hyper News,* a monthly bulletin published by the Company and handed to the employees along with their pay envelopes (R. I, 152–153; IV, 1345–1346). Immediately following this notice and without any intervening space or subhead, there appeared in the *Hyper News* an account of an interview with the president of the Employees' Council concerning "future plans," in which continuance of the Council in some form was indicated (*ibid.*). Instructions were issued by the Company that supervisory employees were to remain neutral in labor matters (R. I, 152; II, 454–457, IV, 1364–1366).

The councilmen utilized the time Cheatham had given for settlement of the Employees' Council's affairs in framing a request to the Company that they be recognized as the employee's exclusive bargaining representatives "until such time as a bargaining agreement forthcoming from a new collective bargaining agent duly organized within the National Labor Relations Act do present such bargaining agreement to represent the employees * * *" (R. I, 153–154; III, 935–936, IV, 1386). The Company rejected this request on the ground that there had not been sufficient time for the employees to have redesignated

the councilmen to act as their representatives (R. I, 154; II, 488–489).

Other business transacted on the company time which Cheetham had granted included selection of a committee to arrange "a meeting of the members of the employees' council and other employees * * * to take what action is necessary for the changing or formation of a Plan that will comply with the National Labor Relations Act"; it was resolved that "during the period of reorganization" the councilmen would continue to carry on "the duties necessary" (R. I, 154–155; IV, 1330–1331). The revision committee continued work on the reorganization, then almost complete, two members of the committee leaving work the next day to work with Boiarsky (R. I, 155; V, 1531). The attorney arranged a meeting of employees to be held on September 2 and suggested that each of the nine councilmen invite employees from his department (R. I, 155; V, 1532). Rohrig, one of the councilmen, consulted with his superintendent in selecting suitable employees to attend; they used confidential lists of employees kept in the superintendent's office and ordinarily available only to supervisory officials (R. I, 156–159; 242–243, II, 754).

About 50 employees selected by the councilmen attended the meeting on September 2 for formal organization of the A. C. E. (R. I, 155; 243). Boiarsky gave legal advice concerning organiza-

tion of "a new Plan" and the constitution and bylaws drafted by the revision committee of the Employees' Council was adopted, with minor changes (R. I, 155; 243, V, 1465). The constitution and bylaws thus adopted for the A. C. E. closely resembled those of the Plan (R. I, 156; Bd. Exh. 4). Six of the nine persons selected to govern the A. C. E. during the ensuing 30-day period, pending the election of permanent officers, were councilmen under the Plan (R. I, 155–156; V, 1465, 1535). In preparing for the election of permanent officers, Councilman Rohrig again consulted with his superintendent to select his "successor" and referred to that official's confidential lists of employees (R. I, 156–160; 247–248).

The organizational campaign which the A. C. E. immediately launched was materially aided by supervisory employees, who openly urged employees to join that organization in preference to the U. M. W. (R. I, 161–165). Shift Engineer Boyles distributed A. C. E. literature among the employees under him (R I, 164; 325–326, 328–329). Foreman Hamrick expressed his favor for the A. C. E., "as a better collective bargaining agent than the C. I. O.," instructed one of his subordinates to solicit members on company time, and told a "gang pusher" to tell his boys to pay their A. C. E. dues (R. I, 162; 203–205, 365, III, 849–850). Assistant Foreman Mays expressed fears that if the U. M. W. organized the plant

the employees would lose their vacations and sick benefits, urged employees to join the A. C. E., and threatened a U. M. W. leader that unless he "shut off that blowing off here I will kick you over the fence" and criticized him for being "against" the A. C. E. (R. I, 161, 163; 254–255, 345–346, III, 819–820, 821, 825, 826, 828–829, V, 7–8, 10). Foreman Carr told one employee that "if you want to stay here and hold your job you better go outside of the gate at the noon hour" and join the A. C. E. (R. I, 164–165; 335–336). Foreman Bradley expressed fear that the Company would revoke various benefits if the U. M. W. prevailed (R. I, 161; 255, Tr. 522). Foreman Stine warned that "the C. I. O. will never come in because the Company doesn't want it" (R. I, 162; 344).

Following the A. C. E. campaign, a meeting for the election of a permanent executive committee was held on September 25. No opportunity was given to vote on the constitution or bylaws; they were *fait accompli* (R. I, 161; see V, 1543–1549). Despite warnings that "some new blood" would be better, six of the nine councilmen under the Plan were reelected; two of the remaining three did not seek reelection (R. I, 160–161; Tr. 292–294, 3619–3620). Since the organization meeting on September 25, 1937, the A. C. E. has held no general meeting of its membership (R. I, 161; V, 1488). In November, 1937, A. C. E. claimed to represent

about 50 percent of the employees (R. I, 183; II, 499). The Company has refused to recognize either the A. C. E. or the U. M. W. (R. I, 183, 187; II, 490).

The Board found that the A. C. E. was plainly the successor of the dominated Plan (R. I, 171–172); that the councilmen who "revised" the Employees' Council Plan into the A. C. E., acted in the Company's interest and pursuant to its desires (R. I, 169–171); and that the employees must have recognized the A. C. E. as the management's candidate (*ibid.*). The Board further found that the employees could not be expected to regard the A. C. E. as "either truly new or independent," since they were well acquainted with the Company's long-standing desire for an "inside" dominated organization, its replacement of the Works Council by the Employees' Council when the former became too plainly illegal, and the role of the councilmen as tools of the management (R. I, 176–177). The posting of the notice on August 31 must, the Board found, have been easily recognizable for what it was: in the Company's *Hyper News* the notice was immediately followed by an intimation that the Plan would be continued in some form (R. I, 178, 152–153). The active roles of supervisory employees in the A. C. E.'s organizational campaign and their opposition to the U. M. W. removed all doubts of where the management's favor lay (R. I, 178). The Board found

that the Company knew that the Association "was in fact the Employees' Council operating under a different name" but "never made any genuine effort to undo the effects of its long campaign of sponsorship of 'inside' organizations and hostility to the U. M. W." (R. I, 183–184). Finally, the Board found that the continued functioning of the A. C. E. "offers a permanent obstacle to the right of the employees to freely consider for themselves the type of agency that would best secure to them the benefits of collective bargaining guaranteed by the Act" (R. I, 185).

Upon the foregoing findings of fact, the Board concluded that the Company had dominated and interfered with the formation and administration of, and contributed support to, the Works Council Plan, the Employees' Council Plan, and the A. C. E. in violation of Section 8 (2) and (1) of the Act (R. I, 168, 185), and that by various acts and statements of its supervisory officials evincing hostility to the U. M. W., the Company had further violated Section 8 (1) (R. I, 185). Accordingly, the Board ordered the Company to cease and desist from (a) dominating, interfering with, or contributing support to the Works Council, the Employees' Council, the A. C. E., or any other labor organization of its employees; (b) in any other manner interfering with, restraining and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act (R. I,

191–192). Finding that the A. C. E. "is a continuation of the Employees' and Works Councils" and that none of the three organizations could "offer to the employees * * * free representation for collective bargaining" (R. I, 186), the Board ordered the Company, as affirmative action to effectuate the policies of the Act, to withdraw and withhold recognition from and to disestablish the three dominated organizations as representatives of any of the employees and to post appropriate notices (R. I, 192–193).

On July 3, 1940, the Company filed in the court below a petition to review and set aside the Board's order (R. V, 1626). The Board answered, requesting enforcement of its order (R. V, 1637). On December 27, 1940, the court handed down its opinion and entered decrees denying enforcement to any part of the Board's order and setting aside the entire order (R. V, 1657–1677). The court indicated that it would have enforced the order but for the notice of August 31, 1937, but held, contrary to the Board's findings, that the notice restored freedom of choice to the employees and that the formation of the A. C. E. was an exercise of that choice (R. V, 1666–1668). The court further held that the activities of the Company's supervisory employees "were not of a nature sufficiently substantial" to warrant any part of the Board's order (R. V, 1673) and that the provisions of the order with respect to the admittedly dominated

Works Council Plan and Employees Council Plan would not be enforced because those organizations had already disappeared (R. V, 1675).

REASONS FOR GRANTING THE WRITS

As we have stated in our petition for certiorari in *National Labor Relations Board* v. *Virginia Electric and Power Co.*, Nos. 758, 759, this Term, petition filed February 12, 1941 (pp. 17–18), the present case is one of a series in which the Circuit Court of Appeals for the Fourth Circuit has disapproved findings of the Board that a labor organization was company dominated or in which the court has exercised its own judgment as to the measures necessary to expunge the effects of unfair labor practices. The Government considers that it is warranted in asking review of the present case, in addition to review of the *Virginia Electric* decision, for two reasons. First, the present case involves a large and important plant in an industry vital to the current national interest. The question whether the Company is maintaining a company-dominated labor organization in that plant is of substantial public importance: the Act proceeds upon the assumption that such conduct, whether or not it extracts present acquiescence from the employees, may finally lead to explosion. Of public importance, too, is the question whether the two to three thousand employees here involved are being denied the rights guaranteed by the Act. Secondly, since the present case involves an organization formed as a successor to admittedly

company dominated unions, and not the initial creation of such a union, a reversal of the decision of the court below in the *Virginia Electric* case would not necessarily establish that the decision in the present case was erroneous, and hence would not preclude adherence to the present decision in future cases.

1. In the present case the court below expressly rested its decision concerning the A. C. E. upon the notices posted by the Company on August 31, 1937 (R. V, 1667–1668); the court concluded that, as a matter of law, the posting of these notices constituted "a sufficient public expression of a 'disestablishment' of the Employees' Council and was an adequate means of assuring the employees of an absolute freedom of choice in their selection of a collective bargaining agency" (R. V, 1668). In so holding, the court denied to the Board power to make findings, as it did in detail (*supra*, pp. 13–14), that in view of the other circumstances indicating continuity and employer support, the notices were not effective to restore employee freedom of choice. Absent the notices, the Board would plainly be entitled to find, as the court below apparently conceded (R. V, 1666), that the A. C. E. must have appeared to the employees to be a continuation of the admittedly company-dominated Employees' Council. Compare *Westinghouse Electric & Mfg. Co.* v. *National Labor Relations Board*, No. 447, this Term, decided March 10, 1941, affirming 112 F. (2d) 657 (C. C. A. 2). The line of successorship was exceedingly clear: the identity of con-

trolling personnel, the origin of the "new" organization in a resolution passed by the old, the carrying out of the initial organizing steps, including drafting of the constitution and bylaws, on company time and property by councilmen discharging the same old duties in the same way, the similarity in set-up, all traced the line. The Board concluded that the notices did not outweigh the sum of these other *indicia* of continuance plus the direct aid given to the A. C. E.'s organizational campaign by the Company's supervisors. It would have been reasonable for the Board to conclude that, apart from all else, the favoritism for the A. C. E. and opposition to the U. M. W. displayed by the Company's representatives (*supra*, pp. 11–12) precluded the notices from having any such effect as the court ascribed to them; especially is this so in view of the Company's long standing and cogently demonstrated preference for an "inside" organization. The court below held, in effect, that the Company's actions lost significance in view of its words; the court stated, on the facts present here, that "so long as the employees are publicly assured by the employer in genuine good faith of his neutrality and impartiality, we believe that the fundamental purpose of the Act is fulfilled" (R. V, 1673).

The decision below transfers the function of determining what measures are sufficient to restore employee freedom of choice to the reviewing court

from the Board, in whose expert discretion this Court and other Circuit Courts of Appeals have repeatedly held that the matter lies. In *Westinghouse Electric & Mfg. Co.* v. *National Labor Relations Board,* 112 F. (2d) 657, 660–661 (C. C. A. 2), affirmed, No. 447, this Term, decided March 10, 1941, the Second Circuit held that the question whether certain action would draw a sufficient line of fracture in the view of the employees between a company-dominated union and its successor, was one for the Board, not for the courts. And in *Western Union Telegraph Co.* v. *National Labor Relations Board,* 113 F. (2d) 992, 996–997 (C. C. A. 2), the same court held that primarily "the Board is to judge" whether the required "absolute and public cleavage between the old and the new" had been accomplished and that the standard of review was whether the record justified a holding by the court "that what was here done inevitably had the desired effect." The decision below is plainly contrary to these holdings.

But the decision in the present case involves more than a wide departure from accepted principles of review. If the mere *pro forma* posting of notices is all that is required in order to validate an organization which emanates from, and, to the employees, is indistinguishable in any essential respect from, its company-dominated predecessor, the entire governmental effort to eliminate the company-dominated union as a factor in labor relations is frustrated. There can be no doubt

under the Act or the Board's decisions that employees may, of their own free will and without employer aid or interference, organize an "inside" union following the elimination of one that is company-dominated. If that is the course they choose, the Act does not interfere with, but protects, their choice. But the nature of the situation requires a careful determination whether the choice has been made under circumstances which permit it to be free. The Board has the duty and power of making that determination. The decision below does not protect a free choice made by employees after they have been released from the constraints imposed by their employer's unfair labor practices; it denies to the Board all power, so long as a notice has been posted by the employer, to determine that other circumstances, however potent, prevented an exercise of free choice. This plain incentive to frustration of the Act's remedies and policies presents a question of public importance.

2. The court refused to enforce either the cease and desist or disestablishment provisions of the order with respect to the admittedly dominated Works Council Plan and Employees' Council Plan on the ground that those organizations "are dead, with seemingly not even any illusory prospects of resurrection. Certainly no useful purpose would be served by 'whipping a corpse'" (R. V, 1675). This holding is in substantial conflict with the decisions of this Court in *Consolidated Edison Co.*

v. *National Labor Relations Board*, 305 U. S. 197, 230, and *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261, 265, as well as with numerous decisions of the Circuit Courts of Appeals.[3]

This matter is, we submit, of considerable importance in the administration of the Act. Despite the Company's demonstrated propensity for establishing company-dominated unions, as shown by the two Plans, aside from the A. C. E., the Board, under the holding of the court below, is powerless to prevent, except through the institution of administrative proceedings *de novo*, either a revival of the dominated organizations or the formation of similar ones in the future. As the Court noted in *Amalgamated Utility Workers* v. *Consolidated Edison Co., et al.*, 309 U. S. 261, 270, the legislative history shows that Congress

[3] *National Labor Relations Board* v. *Stackpole Carbon Co.*, 105 F. (2d) 167, 179 (C. C. A. 3), certiorari denied, 308 U. S. 605; *National Labor Relations Board* v. *Pure Oil Co.*, 103 F. (2d) 497, 498 (C. C. A. 5); *National Labor Relations Board* v. *Boss Mfg. Co.*, 107 F. (2d) 574, 579 (C. C. A. 7); *National Labor Relations Board* v. *Gerling Furniture Mfg. Co.*, 103 F. (2d) 663, 664 (C. C. A. 7); *Staley Mfg. Co.* v. *National Labor Relations Board*, decided November 14, 1940 (C. C. A. 7); *National Labor Relations Board* v. *American Potash & Chemical Corp.*, 98 F. (2d) 488, 493 (C. C. A. 9), certiorari denied, 306 U. S. 643; *National Labor Relations Board* v. *Biles-Coleman Lumber Co.*, 96 F. (2d) 197, 198 (C. C. A. 9); *National Labor Relations Board* v. *Carlisle Lumber Co.*, 99 F. (2d) 533, 541 (C. C. A. 9), certiorari denied, 306 U. S. 646; *National Labor Relations Board* v. *Oregon Worsted Co.*, 96 F. (2d) 193, 196 (C. C. A. 9).

contemplated that "if such practice is resumed, there will be immediately available to the Board an existing court decree to serve as a basis for contempt proceedings." Conference Report, Cong. Rec., 74th Cong., 1st Sess., Vol. 79, pt. 9, p. 10299. And the Board's order, requiring the Company to cease and desist from dominating or interfering with the organizations it has dominated in the past, or with "any other labor organization of its employees" (R. I, 191–192) is fairly designed "to prevent violations, the threat of which in the future is indicated because of their similarity or relation to those unlawful acts which the Board has found to have been committed by the employer in the past." *National Labor Relations Board* v. *Express Publishing Co.,* No. 442, this Term, decided March 3, 1941. See *National Labor Relations Board* v. *Swift & Co.,* 108 F. (2d) 988 (C. C. A. 7).

3. The court held that the activities of the Company's supervisory employees (*supra,* pp. 11–12) "were not of a nature sufficiently substantial to support a finding of the suggested unfair labor practices. * * * The 'potent imponderables permeating this entire record' seem to make it clear that [the Company] has not in these instances, committed any violation of the Act" (R. V, 1673). In thus purporting to rely upon the words of this Court in *International Association of Machinists* v. *National Labor Relations Board,* 311 U. S. 72, 79, the Circuit Court of Appeals neg-

lected to state that those "potent imponderables" are primarily to be judged by the Board, not the courts. There can be no doubt that the activities of the supervisory employees in this case were thoroughly coercive and that the Company is answerable for those activities under principles now firmly established. The *Machinists* case, *supra,* at pp. 79–81; *H. J. Heinz Co.* v. *National Labor Relations Board,* No. 73, this Term, decided January 6, 1941; *National Labor Relations Board* v. *Link-Belt Co.,* Nos. 235, 236, this Term, decided January 6, 1941.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for writs of certiorari should be granted.

FRANCIS BIDDLE,
Solicitor General.

ROBERT B. WATTS,
General Counsel,
National Labor Relations Board.

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